STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH N. ATTANASIO	:	DETERMINATION DTA NO. 818074
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Earnings Tax on Nonresidents under Chapter 19, Title 11 of the Administrative Code of the City of New York for the Years 1994 and 1995.	:	

Petitioner, Joseph N. Attanasio, 73 Highland Street, Concord, Massachusetts 01742, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City earnings tax on nonresidents under Chapter 19, Title 11 of the Administrative Code of the City of New York for the years 1994 and 1995.

Petitioner and the Division of Taxation consented to have the controversy determined on submission of documents and briefs without a small claims hearing. The last brief [1] was required to be filed by July 14, 2003, which date began the three-month period for the issuance of this determination. Petitioner appeared *pro se.* The Division of Taxation appeared by Mark F. Volk, Esq. (Kevin R. Law, Esq., of counsel).

[1] In a letter dated July 8, 2003 which was included with his reply brief, petitioner offered to "voluntarily submit to a polygraph test to verify the facts as presented in his Brief, if DT&F counsel would require the audit agent and her supervisor to agree to also answer the issues asserted by Petitioner therein regarding the Audit File Record and Guidelines." The record herein was closed to the submission of evidence as of May 30, 2003 and petitioner's offer to submit additional evidence after the record was closed must be denied (***Matter of Giuffre,*** Tax Appeals Tribunal, September 12, 2002).

After reviewing the documents and briefs, James Hoefer, Presiding Officer, renders the following determination.

ISSUES

I. Whether the compensation petitioner received from Kidder Peabody & Co. for the years at issue was derived from or connected with New York State and City sources and, if so, whether said compensation was earned as a nonresident employee to be allocated to State and City sources based on a percentage determined by dividing the number of days worked within the State and City by the total number of days worked, or whether said compensation was determined directly upon the volume of business transacted by petitioner and should thus be allocated to New York State and City sources based on a percentage determined by dividing the volume of business transacted by him within the State and City by the total volume of business transacted by him from all sources.

II. Whether petitioner is entitled to the abatement of interest and penalty charges pursuant to Tax Law § 3008.

III. Whether petitioner has been subjected to undue hardship or abuse of process as the result of the intentional and/or gross negligent acts of the Division of Taxation.

FINDINGS OF FACT

1. Petitioner herein, Joseph N. Attanasio, is a certified public accountant licensed in Connecticut who, prior to the years at issue, was a nationally recognized expert in U.S. and international taxation and also a former senior tax manager for Price Waterhouse & Co. in New York City. For the two years in dispute petitioner was a United States citizen and also a permanent resident of Brazil. There is no dispute herein that petitioner was taxable as a nonresident of both the State and City of New York for the years 1994 and 1995.

2. On or about February 7, 1994, petitioner was hired by Kidder Peabody & Co. ("KP"), a wholly-owned subsidiary of GE Capital/GE Inc., to establish a South American investment banking regional office for KP in San Paulo, Brazil. Because of the unstable currency situation in Brazil, petitioner negotiated with KP to have his compensation paid in U.S. dollars and deposited to a domestic (Connecticut) bank account by Kidder Peabody New York. Petitioner was named president of the Brazilian entity, Kidder Peabody South America, and said entity reimbursed Kidder Peabody New York for the amounts it paid to petitioner. In January 1995, GE Capital/GE Inc. sold KP to Paine Webber and petitioner's employment ceased in August 1995 after he completed outstanding business matters and closed the South American office.

3. On or about June 15, 1996, petitioner filed a 1995 New York State and City personal income tax return indicating that he was a nonresident of the State and City for the entire tax year and that he had derived no income from New York State and City sources in 1995. Petitioner's return reported, *inter alia*, wage income of $507,563.00; however, no portion of this wage income was reported as having been earned from New York State or City sources. Attached to the return was a wage and tax statement issued by KP which reflected that for 1995 petitioner was paid total wages of $448,328.03 and that $16,037.32 of New York State tax and $274.88 of New York City tax was withheld from said wages. Petitioner's return claimed a full refund of the New York State and City tax withheld from his wage income and in August 1996 the Division of Taxation ("Division") approved the $16,312.00 refund as requested. Petitioner did not file a 1994 New York State and City personal income tax return; however, he did file a U.S. individual income tax return for 1994 reporting, *inter alia*, wage income of $238,286.00.

4. The Division conducted a review of KP's New York State and City withholding tax records, and based on this examination the Division determined that KP paid petitioner wages of

$175,978.00 for the 1994 tax year from which no New York State and City tax was withheld. Based on this discovery, the Division decided to review petitioner's returns for the years 1993,[2] 1994 and 1995 to determine if there existed any New York State and City personal income tax liability.

5. On January 30, 1997, the Division first corresponded with petitioner stating that the years 1993, 1994 and 1995 were being audited and that "in our review, we will be addressing your New York State nonresident status." The letter requested that petitioner complete and return a nonresident audit questionnaire, which he did on February 20, 1997. Included with the questionnaire was a schedule prepared by petitioner listing the number of days he was present in New York State and City for business purposes. From this schedule the Division determined that petitioner worked a total of 26 days in the State and City for 1994 and 10 days in 1995.

6. Over the next three months, the Division's auditor requested and petitioner provided additional information via letters and telephone calls. The auditor's Tax Field Audit Record indicates that after reviewing petitioner's last submission on May 19, 1997, she was "not sure of futher [sic] course of action" and that she needed "teamleader's input in order to make decision." More than 21 months elapsed before the Division next corresponded with petitioner by mailing to him two statements of personal income tax audit changes, one for 1994 and the other for the 1995 tax year, each dated February 25, 1999. Both statements contained the following explanation for the audit adjustments, "[A] percentage of your wages earned has been allocated to NYS/NYC based upon the number of days worked in NYS to days worked outside NYS.

[2] The 1993 tax year is not at issue in this proceeding. Petitioner was not required to file a Federal income tax return for 1993 and the Division has made no claim that New York State and City taxes are due for 1993.

Since no information reguarding [sic] non-working days was submitted, a standard number of non-working days was assumed."

7. On June 7, 1999, the Division mailed a Notice of Deficiency to petitioner asserting that $3,193.01 of New York State and City personal income tax was due for the years 1994 and 1995, together with penalty and interest. Penalty was asserted pursuant to Tax Law § 685(a)(1) since petitioner did not file a 1994 New York State personal income tax return on or before the prescribed due date.

8. On August 2, 1999, the Division's Bureau of Conciliation and Mediation Services ("BCMS") received a Request for Conciliation Conference from petitioner protesting the Notice of Deficiency date June 7, 1999. Petitioner's basis for disagreement was that the business days spent in New York State and City in 1994 and 1995 were merely for administrative meetings, training and seminars. Petitioner argued that the law must be applied equally to all or none and that the Division's position in this matter would require taxation of any nonresident that came into the State or City for any business day. A conciliation conference was held on June 12, 2000 and on July 21, 2000 BCMS issued a Conciliation Order sustaining the Notice of Deficiency.

9. On October 20, 2000, petitioner filed a petition with the Division of Tax Appeals contesting the Conciliation Order on the grounds that "[A] general allocation based solely upon days in New York, without relevance as to purpose and connection with compensation, is arbitrary and inequitable" and that the law is unconstitutional if it is intended to tax a nonresident "simply for attending a conference, seminar or even a meeting of some sort in New York."

10. This matter was scheduled for a small claims hearing on two separate occasions, December 13, 2001 and December 13, 2002; however, petitioner did not appear at either

scheduled hearing. Eventually, petitioner opted to have the controversy determined on submission.

SUMMARY OF THE PARTIES' POSITIONS

11. Petitioner asserts that as an investment banker he was in fact a highly paid salesperson whose total compensation was based solely and exclusively on the number and size of investment banking transactions he produced. In his brief, petitioner maintains that the total compensation he received from KP was calculated using a percentage of the total volume of business/transaction fees he produced and that "the 'year-end bonus' paid to the banker is then the actual total compensation/commission earned as calculated dependent upon volume of fees, less the amount of base (draw)/other amounts already paid to the banker." Petitioner argues that since his total compensation from KP depended directly upon the volume of business he transacted, said compensation is to be allocated to New York sources pursuant to 20 NYCRR 132.17, i.e., based on a percentage determined by dividing the volume of business transacted by him in New York by the total volume of business transacted by him. Petitioner contends that since all of his clients were located in South America and since all of his services required to originate transactions occurred outside New York, the Tribunal's decision in ***Matter of O'Connell*** (Tax Appeals Tribunal, March 6, 1997) supports that he had no volume of business transacted within New York and that therefore no portion of his compensation from KP can be allocated to New York sources under 20 NYCRR 132.17.

12. Petitioner next asserts that the Division's auditor, supervisor and conferee committed intentional and/or gross negligent acts in connection with the audit and appeals process, all to his detriment. Specifically, petitioner maintains that the auditor and supervisor failed to follow the audit guidelines and that they failed to communicate with him in a reasonable and timely

manner. Petitioner points out that he had no contact from Division personnel for a 21-month period, from the May 19, 1997 date that he submitted additional documents to the February 25, 1999 issuance of the statements of personal income tax audit changes, and that said delay prevented him from obtaining important foreign corporate records including accounting and compensation documents.

13. Petitioner alternatively argues for abatement of interest and penalty charges pursuant to Tax Law § 3008 since the Division violated its own guidelines throughout the audit and conciliation conference process, thereby "resulting in a violation of taxpayers rights" under Tax Law § 3030.

14. The Division maintains that most of the facts alleged in petitioner's brief are not supported by the record and that such unsworn statements cannot be accepted as evidence citing ***Matter of Keyloun*** (Tax Appeals Tribunal, April 6, 1995) and ***Matter of Lyndsey Harrison, Inc.*** (Tax Appeals Tribunal, February 1, 1996). The Division characterizes the rest of petitioner's arguments as "chock full of irrelevant platitudes not meriting a response."

CONCLUSIONS OF LAW

A. Tax Law § 631(a) provides that the New York source income of a nonresident taxpayer is the net amount of income, gain, loss and deduction used to compute Federal adjusted gross income which is "derived from or connected with New York sources." As relevant herein, Tax Law § 631(b)(1)(B) provides that income, gain, loss and deduction derived from or connected with New York sources include those items attributable to "a business, trade, profession or occupation carried on in this state." In those situations where a business, trade, profession or occupation is carried on partly within and partly without New York, Tax Law § 631(c) provides that the "income, gain, loss and deduction derived from or connected with New York sources

shall be determined by apportionment and allocation under such regulations." In the instant matter, the Division, relying on regulation 20 NYCRR 132.18, has allocated petitioner's KP compensation to New York sources based on the number of days he worked within and without New York. Petitioner, on the other hand, argues that regulation 20 NYCRR 132.17, which provides for an allocation based on volume of business transacted within and without New York, is applicable to the facts of this case.

B. As pertinent to this dispute, 20 NYCRR 132.17, entitled "Earnings of salesmen," provides that "[I]f the commissions for sales made or other compensation for services performed by a nonresident traveling salesman, agent or other employee depend directly upon the volume of business transacted by him . . ." the compensation is to be allocated to New York sources based on a percentage determined by dividing the volume of business transacted within New York by the total volume of business transacted from all sources. My review of the record leads to the conclusion that there is insufficient evidence in the record to support that petitioner's compensation from KP depended directly on the volume of business he transacted and therefore petitioner has failed to meet his burden of proof (Tax Law § 689[e]). While petitioner claims that his ability to produce documentary evidence was impaired by the sale of KP and the Division's undue delay in the audit process, I find such arguments to be without merit. Certainly an employment agreement or some form of summary computation from KP detailing how petitioner's compensation was computed for each year in question, two documents presumably in petitioner's possession, would be sufficient to document the manner in which he was compensated. Petitioner submitted a total of 32 exhibits into the record, yet not one piece of documentary evidence or affidavit was adduced to verify the manner in which he was compensated by KP. It is also interesting to note that petitioner's claim for an allocation based

on volume of business transacted was raised for the very first time in his initial brief received on June 2, 2003. Furthermore, it is noted that petitioner's employer reported his compensation as wages, tips, other compensation on Form W-2, Wage and Tax Statement, and evidence in the record reveals that petitioner received bimonthly checks from KP in the sum of $5,333.33, which computes to a significant annual salary of $127,999.92. While petitioner received wage and tax statements from KP reporting wages, tips, other compensation of $175,978.00 for 1994 and $448,328.03 for 1995, amounts greater than the total of his bimonthly checks, there is nothing in the record to show how these amounts were determined, e.g., year-end bonus, separation/termination pay, volume of business transacted or some other unknown or undisclosed compensation package. Since there is no evidence to support that petitioner's compensation from KP depended directly on the volume of business he transacted, the Division correctly allocated his KP compensation based on the days petitioner worked within and without New York.[3]

C. Petitioner next seeks abatement of interest and penalty charges citing[4] Tax Law § 3008(a)(1) and (2) as authority for such abatement. For the years at issue, Tax Law former § 3008(a) provided for the abatement of interest only, and not penalties, on "any deficiency. . . determined to be due attributable in whole or in part to any error or delay by an officer or employee of the department (acting in his or her official capacity) in performing a ministerial

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[3] Although the petition filed herein originally raised arguments concerning whether it was proper to allocate petitioner's KP income based on days worked within and without New York, this argument has apparently been abandoned as petitioner's briefs focus only on the volume of business transacted theory. Accordingly, it is not necessary to address the propriety of the Division's allocation based on days worked within and without New York.

[4] In his briefs, petitioner has cited Tax Law § 3008 as amended by Laws of 1997 (ch 577, § 56[f]), which inserted the word "unreasonable" preceding "error" and reference to the performance of "managerial acts." Since the amendment was applicable to taxable periods beginning after the September 10, 1997 effective date, I have cited the statute as it existed for the years in question.

act. . . ." Tax Law § 3008(b)(1) provided for the abatement of penalty or excess interest "attributable to erroneous advice furnished to the taxpayer in writing by an officer or employee of the department of taxation and finance, acting in such officer's or employee's official capacity."

D. The crux of petitioner's argument concerning the waiver of interest and penalty stem from the length of time it took the Division to complete its audit and also the time that elapsed during the appeal process. As an example, petitioner points to the unexplained 21-month delay from the May 19, 1997 date that he last submitted information to February 25, 1999, the date that the Division next corresponded with petitioner via the issuance of the statements of personal income tax audit changes. Although there are no regulations at the State level, it is appropriate to review Federal regulations and precedent since Tax Law former § 3008 is patterned after Internal Revenue Code former § 6404(e)(1). Treasury regulation § 301.6404-2(b)(2) defines "ministerial act" as:

> a procedural or mechanical act that does not involve the exercise of judgement or discretion, and that occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and review by supervisors, have taken place. A decision concerning the proper application of federal tax law (or other federal or state law) is not a ministerial act.

Any delays at issue in this matter are not attributable to error or delay by the department in performing a ministerial act and therefore petitioner is not entitled to have interest waived pursuant to Tax Law former § 3008(a) (***see, Strang v. Commr***., 81 TCM 1566). With respect to petitioner's use of Tax Law former § 3008 to request abatement of the late filing penalty assessed for the 1994 tax year, it is clear that Tax Law former § 3008 is inapplicable since subsection (a) applies only to the abatement of interest; while subsection (b) provides for the abatement of penalty only with respect to erroneous written advice furnished by the Division, a

situation not at issue herein. While the late filing penalty imposed pursuant to Tax Law § 685(a)(1) can be waived if "it is shown that such failure [to timely file] is due to reasonable cause and not due to willful neglect," no evidence or argument has been adduced to establish reasonable cause. Accordingly, the Division's imposition of the late filing penalty for 1994 is sustained.

E. Although petitioner maintains that he has been subjected to undue hardship or abuse of process as the result of the intentional and/or gross negligent acts of the Division, I find no merit to these allegations. As noted in Conclusion of Law "B", documents to support that petitioner's compensation depended directly on the volume of business he transacted, an argument raised for the first time on June 2, 2003, should have been in his possession and thus I perceive no undue hardship imposed upon petitioner. Also, the record herein does not support that there was an abuse of process or that the Division committed intentional and/or gross negligent acts.

F. Petitioner has also argued in his initial brief that he may be entitled to recover reasonable litigation costs pursuant to Tax Law § 3030. It is noted that a request for costs at this time is premature pursuant to Tax Law § 3030(c)(5)(A)(ii). To the extent not specifically addressed herein, I have considered petitioner's remaining arguments and find them to be without merit or not supported by the record.

G. The petition of Joseph N. Attanasio is denied and the Division's Notice of Deficiency dated June 7, 1999 is sustained, together with such penalty and interest as allowed by statute.

DATED: Troy, New York
October 9, 2003

/s/ James Hoefer
PRESIDING OFFICER